No. 84-1580

In The
# Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,
*Petitioner*,

v.

JOSEPH INADI,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER TAPED CO-CONSPIRATOR DECLARATIONS, MADE IN CODE AND NOT UNDERSTANDABLE BY THE TRIER OF FACT WITHOUT TRANSLATION, WERE ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE WHERE THERE WAS NO SHOWING NOR EVEN MINIMAL ATTEMPT TO SHOW THAT THE DECLARANT WAS UNAVAILABLE.

II. WHETHER THE UNITED STATES, HAVING FAILED TO RAISE THE ISSUE AT ANY TIME PRIOR TO ITS PETITION FOR REHEARING, MAY NOW PROPERLY CONTEST THE LOWER COURT'S DECISION TO REMAND FOR A NEW TRIAL RATHER THAN FOR A HEARING ON THE WITNESS' UNAVAILABILITY.

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The respondent, Joseph Inadi, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Court of Appeals for the Third Circuit in this case. That opinion is reported at 748 F.2d 812 and is set forth at Pet. App. 1a-16a. The order amending the opinion (Pet. App. 17a-19a) is not yet reported.

## COUNTER-STATEMENT OF THE CASE

Respondent was convicted by a jury of one count of conspiring to manufacture and distribute methamphetamine, and of four counts of related offenses. His conviction was reversed by the Court of Appeals because the government had failed to demonstrate the unavailability of a co-conspirator whose declarations were introduced at trial.[1]

The lower court's opinion, which contains a summary of the evidence at trial (Pet. App. 2a-5a), characterized five tape-recorded telephone conversations as the "linchpins of the government's case" (Pet. App. 4a). Three of these conversations were between respondent and one John Lazaro. Portions of each of these conversations were, as petitioners concede, conducted in code. (Pet. 4) Since none of the taped conversations contained any explanation of the meaning of the code, the government called two witnesses to translate it for the jury (2 Trs. 104-5; 4 Trs. 444.) Neither respondent nor Mr. Lazaro testified at trial. The fourth conversation played to the jury involved Marianne Lazaro, John Lazaro's wife, and Michael McKeon, both unindicted co-conspirators who testified at trial pursuant to grants of immunity. McKeon described the scope of the conspiracy and Mrs. Lazaro's testimony was addressed to one encounter during the conspiracy. The fifth tape recording was of a conversation between Mr. Lazaro and William Levan, an unindicted co-

[1] The opinion of the Court of Appeals is set forth in the Appendix to the government's Petition to this Court, at pp. 1-19a. References to the Appendix herein will be cited as "Pet. App. —".



conspirator. Levan did not testify at trial, having appeared out of the presence of the jury to invoke his privilege against self-incrimination. The verdict was returned shortly after the jury had requested and obtained permission to listen to the Levan-Lazaro tape a second time.

The government's failure to produce John Lazaro for cross-examination or to demonstrate his unavailability was the subject of objection by respondent on the ground that the introduction of Lazaro's statements in four of the five recorded conversations violated rights secured by the Confrontation Clause. The government took the position at the trial that it did not have to show Lazaro's unavailability (3 Trs. 288). The government's attorney represented to the district court that Lazaro had advised her that he would refuse to testify if called, despite her warnings that if he did so he faced penalties for contempt (3 Trs. 292).

The district court did not, as the government asserts at pages 5-6 of its Petition to this Court, admit the conversations "in reliance on the government's representation that Lazaro would refuse to testify whether or not he had a valid Fifth Amendment privilege and was therefore unavailable." Rather, the trial court conditionally admitted the conversations in reliance on the prosecutor's representation that she would produce Lazaro and that he would refuse to testify (3 Trs. 292-293). The government made no claim at trial that Lazaro could have claimed the Fifth Amendment as a basis for refusing to testify. That contention was raised first in its brief to the court of appeals. Indeed, the prosecutor opined at trial that Lazaro had no such claim of privilege (4 Trs. 408), and explained his absence as "apparently" due to "car prob-

lems'' (*Id.*). The trial court then expressly agreed to hear Lazaro out of the presence of the jury upon his arrival (*Id.*). The govenment did not at any time call Lazaro to testify at the hearing out of the jury's presence. At no time did the trial court, as the government's Petition suggests, rule that the government had made sufficient representations to establish that witness' unavailability. The order finally admitting the Lazaro conversations contained no response to respondent's continuing objection to the failure to produce him for cross-examination (5 Trs. 574-575).

On this record, the court of appeals ruled that admission of the Lazaro conversations was error, despite their qualification as co-conspirator declarations under Fed. R. Evid. 801 (d)(2)(E), because the government had failed to make the "*minimal* showing of unavailability that will satisfy the Confrontation Clause" (Pet. App. 14a-15a) (emphasis in original). The opinion sets forth three alternative ways to make the requisite minimal showing, none of which was pursued by the government at the trial of this case: demonstration of a good faith effort on the part of the government to secure the witness' attendance at trial; production of the witness to invoke a claim of privilege; or production of a record, such as affidavit from the declarant, which establishes both that he will claim the privilege and that requiring his actual appearance would be a meaningless formality (Pet. App. 15a-16a, 18a).

The government petitioned for rehearing, challenging the holding of the court and urging in the alternative, for the first time, that the proper remedy was a remand for



a hearing on Lazaro's unavailability rather than a new trial. The petition for rehearing was denied.

## REASONS FOR DENYING THE WRIT

1. This case presents a straightforward application of the principles embodied in the Confrontation Clause of the Sixth Amendment and expounded by this Court in *Ohio v. Roberts,* 448 U.S. 56 (1980). The court below considered the constitutional propriety of the prosecution's use of out-of-court statements of a witness where the witness was not called to testify and was not shown to be unavailable, and where the utility of trial confrontation was uncontested. The statements, in this case tape-recorded telephone conversations, were in code.

Relying principally on *Roberts,* the court of appeals held that in the circumstances of this case the introduction of the out-of-court statements violated the Confrontation Clause. Before reaching that issue, the court held that the statements in question were declarations of a co-conspirator and admissible under Fed. R. Evid. 801 (d)(2)(E).

The holding of the court of appeals is much narrower than is suggested by the petition of the United States. The court did not directly or by necessary implication hold that Rule 801 (d)(2)(E) was unconstitutional, nor did it have occasion to rule on the applicability of the Confrontation Clause to Rule 803. This case concerns only the application of the Confrontation Clause to statements admissible under Rule 801 (d)(2)(E). It concerns

a specific factual situation where the utility of trial confrontation was apparent and not contested by the government.

In cases to which the holding below does apply, the burden of which the government complains is modest. If the issue of availability of a witness is properly raised through a specific and timely objection, the prosecution is required either to show a good-faith effort to produce the witness for cross-examination or to demonstrate the unavailability of the witness. In this case the government did show the unavailability of one witness without apparent difficulty. Unavailability may be shown by a properly drawn affidavit from the witness.[2]

2. The opinion below faithfully applies previous decisions of this Court which make clear that the evidentiary rules governing admissibility of out-of-court statements and the Confrontation Clause are not exact equivalents. *Ohio v. Roberts,* 448 U.S. 56 (1980); *Dutton v. Evans,* 400 U.S. 74 (1970); *California v. Green,* 399 U.S. 149 (1970). It has long been recognized that statements admissible as exceptions to the bar against hearsay may be barred by virtue of a defendant's right to confront the witnesses against him. See *Barber v. Page,* 390 U.S. 719 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965). Similarly, out-of-court statements of an unavailable witness, while raising no Confrontation Clause issue, may or may not be considered inadmissible hearsay depending on the manner and

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[2] Given the court of appeals' suggestion that an affidavit concerning unavailability would suffice in relieving the government of Confrontation Clause problems, we have difficulty in understanding the United States' position that the holding is "burdensome and controversial." (Pet. 8.)



occasion of their utterance. Although the non-coextensive nature of the Clause and the Rules require separate analysis, the proposed justification for admission of an out-of-court statement is significant for both.

a. The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." It is designed to protect an accused individual from conviction on the basis of out-of-court testimony, without benefit of cross-examination:

> the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions . . . thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. . . .
>
> "The proof was usually given by reading depositions, confessions of accomplices, letters and the like. . . ."

*California v. Green, supra,* 156-57 (quoting 1 J. Stephen, A History of the Criminal Law of England 326 (1883)). *See also Douglas v. Alabama,* 380 U.S. 415, 418 (1965). In confronting witnesses, the defendant has the benefit of

> a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Mattox v. United States,* 156 U.S. 237, 242-43 (1895).

At issue in this case is the right of a defendant to cross-examine a witness against him. John Lazaro, through

the tape recordings introduced into evidence, was a critical witness against respondent, just as Cobham, through depositions introduced at trial, was a witness against Sir Walter Raleigh. 1 Stephen, *supra,* 333-336. The issue is distinct from that of compulsory process, or of responsibility for calling a witness equally available to both parties. The government seeks, in this instance, to avail itself of Lazaro's testimony without providing the defendant an opportunity to cross-examine him before a jury in order to question the meaning, reliability, credibility and accuracy of his statements.

b. At issue here are out-of-court statements which, by definition, are not hearsay. Rather, they were admitted under Rule 801 (d)(2)(E), which provides:

A statement is not hearsay if—

. . .

> (2) . . . The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The non-hearsay status of co-conspirator statements rests in part on an extension of the rule allowing for introduction of admissions of a party opponent, on the theory that each co-conspirator is the agent of every other co-conspirator. *See* Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1384-85 (1972). The rule providing for the admissibility of co-conspirator statements does not embody a judgment that they are likely to be reliable because of the circumstances in which they are made, nor does it rest on the



fact that proof of the out-of-court statement is the only method of putting the evidence before the jury because of the unavailability of the live witness.

Statements admissible under Rule 801 (d) (2)(E) are often without any hint of reliability. Statements in furtherance of a conspiracy may include statements between co-conspirators which are designed to maintain the spirits of the co-conspirators. There is no analytical reason to assume that such statements would be truthful or accurate. Often co-conspirators deliberately mislead each other in their efforts to encourage continued cooperation in the conspiracy.[3]

As to many such statements, the likely utility of cross-examination is apparent. A defendant's ability to explore the reasons leading a co-conspirator to make particular statements could entirely alter the weight accorded them by the trier of fact. Similarly, the potential prejudice from their admission without the opportunity to cross-examine the declarant is obvious, as is the prejudice from admission, without confrontation, of discussions in code.

The government's petition fails to take note of the differences between Rule 801 (d)(2)(E) and Rule 803. The classification of co-conspirator's statements as non-hearsay, rather than as an exception to the general rule,

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[3] One of the critical conversations in this case takes place following a DEA stop of the Lazaros. In speculating about the implications of DEA's activities on the conspiracy, Lazaro makes representations to Levan which are contrary to the testimony of other co-conspirators. The theory of admission of these statements, which are obviously of questionable reliability, was that they were made in an effort to maintain the co-conspirator's confidence in Lazaro, and thus maintain the conspiracy.

reflects a significant theoretical distinction between co-conspirators' statements and traditional hearsay.

The government is wrong in its assertion that the opinion below requires analysis of the application of the Confrontation Clause to Rule 803. That issue is not raised in this case. Other Courts of Appeals have held that evidence admissible under the Federal Rule of Evidence 803 may be inadmissible under the Confrontation Clause. *See, e.g., Haggins v. Warden,* 715 F.2d 1050, 1055 (6th Cir. 1983) (excited utterance), *cert. denied,* — U.S. —, 104 S.Ct. 980 (1984); *Hutchins v. Wainwright,* 715 F.2d 512, 516 (11th Cir. 1983) (statement of anonymous informant to police), *cert. denied,* — U.S. —, 104 S.Ct. 1427 (1984); *United States v. Washington,* 688 F.2d 953, 959 (5th Cir. 1982) (business records); *Lenza v. Wyrick,* 665 F.2d 804, 810-11 (8th Cir. 1981) (exception for "state of mind"); *Williams v. Melton,* 733 F.2d 1492, 1496 (11th Cir.) (res gestae), *cert. denied,* — U.S. —, 105 S.Ct. 567 (1984). In each of these instances, the holding is clearly derived from a careful reading of this Court's opinion in *Roberts.* None of them led to an evisceration of Rule 803. There is no reason to expect that this case will do so.

Rule 803's exceptions to the general bar against hearsay are grounded in the notion that the circumstances leading the declarant to speak also provide a sound basis for inferring the reliability and accuracy of the statement.[4]

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[4] If a defendant produces evidence which undermines the reliability of an 803 statement, the statement may not be admitted even though it is in technical compliance with a listed

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(Other exceptions, included under Rule 804, are based on the recognition that it is sometimes impossible to bring the declarant before the trier-of-fact and that the out-of-court statements are made under circumstances which offer some assurance of their reliability.[5]) An analysis of the application of the Confrontation Clause to Rule 803 must take into account the inherent reliability of the statements admitted under this rule.

In a criminal case, Rules 803 and 804 protect the government's interest in using the out-of-court declarations once it meets the obligation of affording the right to confrontation. Declarations within the exceptions listed under Rule 804 are admissible only when the declarant is unavailable. Declarations within the exceptions catalogued at Rule 803 are admissible "even though the declarant is available as a witness."[6] A determination that, in a particular case, the Confrontation Clause requires the government to produce a declarant or demonstrate unavailability before using the declarant's out-of-court state-

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exception. Generally, the reliability is presumed if the out-of-court declaration falls within an exception. If the reliability of the statement is called into question, the presumption of reliability alone may not be a sufficient basis for the statement's admission. This is in sharp contrast to co-conspirator's statements, which are admissible even in the face of evidence that they are in fact unreliable. *See McCormick's Handbook on the Law of Evidence* (E. Cleary 2d ed. 1972).

[5] If statements are admissible under Rule 804, then the unavailability of the declarant will have been demonstrated and there will generally be no Confrontation Clause issue.

[6] Were it not for this provision of Rule 803 once the government produced the declarant of a Rule 803 statement, the out-of-court statement would become inadmissible.

ment does not drain Rule 803 of substance. Neither does it lead towards the proposition that the Confrontation Clause bars the use of hearsay at a criminal trial. On the contrary, it highlights Rule 803's function—to provide for the admission of hearsay once the constitutional requirements have been met.

3. The decision below does no violence to this Court's repeated admonitions that a demonstration of unavailability need not be made where the utility of such confrontation is remote. *See Ohio v. Roberts,* 448 U.S. 56, 65 n.7. (1980); *Dutton v. Evans,* 400 U.S. 74 (1970). Indeed, the court below took note of that exception to the availability requirement, despite the fact that the United States had failed to argue either at trial or on appeal that the exception was applicable to this case. (Pet. App. 12a n.4.) ("The government, however, does not rely on this exception and we do not find it applicable here.")

4. Even in cases falling within the narrow category at issue here, the burden on the government is slight. If the witness is unavailable, the government is obliged to demonstrate unavailability as it did with William Levan at trial. This need not require any extensive proceeding. Indeed, in the opinion below, the court stated that properly-drawn affidavits could serve to meet the government's burden. (Pet. App. 18a, n.7)

If the witness is in fact available, then the government must call the witness to testify. The requirement that the government produce the maker of the out-of-court statements, as its witness during its case, is the essence



of the Confrontation Clause.[7] Production of the witness in no way precludes the use of the out-of-court statements. In the absence of Rule 801 (d)(2)(E) the government would be obliged to rely solely on the live testimony of the co-conspirator. Rule 801 (d)(2)(E) allows the government to introduce in addition the out-of-court statements of the witness, in this case tape-recorded conversations.

5. The second question presented by the United States in its petition—the appropriateness of a remand for a hearing on the unavailability of the witness in question—is not addressed in the opinion below. The United States never raised the issue until its Petition for Rehearing and Suggestion for Rehearing In Banc.[8] "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 233-34 (1976). *See also United States v. Lovasco,* 431 U.S. 783, 788-89 (1977); *Usery v. Turner Elkhorn Mining Company,* 428 U.S. 1, 37-38 (1976); *Singleton v. Wulff,* 428

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[7] The United States speculates at page 16 of its petition that if a witness is not called it is usually because: the witness is certain to invoke the Fifth Amendment or otherwise refuse to testify; or he is truly beyond the law's reach; or the government cannot rely upon the witness' testimony, since he still is in league with the defendant. The first two reasons cited need not long detain us, since in each circumstance the government can simply demonstrate the witness' unavailability. As to the third reason, we can see no basis in the history of Confrontation Clause jurisprudence to permit the admission of out-of-court declarations because the government does not believe that the witness, if presented live, will testify consistently with the prior statement. It seems to us that such justifications raise concerns which are precisely those which the Clause was designed to guard against.

[8] It is unclear whether the issue at such a hearing would be the present availability of Lazaro or his availability at the time of the trial in October, 1983.

U.S. 106, 120 (1976). The remedy now sought by the United States is neither simple nor expeditious. Because the issue was not properly raised, the scope and purpose of such a hearing are ill-defined and raise factual issues not addressed by the parties.[9]

The suggestion that the Court remand for a hearing is without merit. The government was advised at trial that it should produce the witness. It chose not to do so, representing only that he "apparently" had "car trouble." A hearing now—whether on present or past unavailability—would be completely inadequate. There is no allegation that the witness was physically unavailable. Rather, in addition to "car trouble", the government has represented that he would suffer a judgment of contempt rather than testify.[10]

Whether or not Lazaro would have gone to contempt at time of trial, or whether or not he will choose to go to contempt at a new trial, is not capable of determination now.[11] In this instance the hearing requested by the government would be meaningless.[12]

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[9] The government's failure to raise this issue at any time before its petition for rehearing suggests that it is not a recurring problem. Had it been so, it would be reasonable to expect that the government would request the relief it now seeks from the outset of the litigation.

[10] The Fifth Amendment claim was never made at trial. Thus, it is not properly before the court now.

[11] As the court below noted, any such determination of the witness' likely response to a threat of contempt would be based on speculation: "Every veteran trial judge has experienced the situation where a hostile witness discards his 'stonewalling' tactics when faced with an imminent contempt citation" (Pet. App. 15a).

[12] In this case, where several conversations were partly in code, where one statement involved allegations which were

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## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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inconsistent with other trial evidence, and where the government does not contest the utility of confrontation, there is no likelihood that the district court would find beyond a reasonable doubt that cross-examination of Lazaro would not have been useful at trial.